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IN THE

Supreme Court of the United States

October Term, 1967

No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

RESPONDENT'S MEMORANDUM IN RESPONSE TO THE SOLICITOR GENERAL'S MEMORANDUM AND PETITIONERS' COMMENT CONCERNING IT.

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The Solicitor General Has Reached a Wrong Recommendation.

The Solicitor General concludes that "this record does not fairly raise the issues presented in *Lisi*" (his memorandum, page 12). Why, then, should there be further delay of this overly-protracted case? Is not the unusual consideration this court has already given the case due to petitioners' representation (hotly disputed by respondent) that *Lisi* and this case present the same issues?

The Solicitor General's analysis of the record [1] should have led him to the quite obvious conclusion that there is nothing for this court to review, certainly nothing of fundamental importance. Although in his view the Court of Appeals "misread the Warsaw Convention" (his memorandum, page 6),[2] he nevertheless believes that the judgment in the case was correct unless the Berguido ticket was not "adequate under Article 3" (his memorandum, pages 6 and 10).

Whether a ticket is "not adequate" and whether the passenger had an opportunity to take protective measures are fact questions to be resolved by the fact finder under all the evidence. See *Mertens v. Flying Tiger Line, Inc.*, 341

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1. We assume that many of his references to "the record" are to "the papers available to us" (his memorandum, pages 10-11) which must fall far short of the entire record of the case. All references made in our brief are documented to the record (which include the pre-trial proceedings). If the Court grants certiorari, it will find on review of the entire record that it fully supports our factual assertions.

2. We respectfully submit that he has misread the opinion of the Court of Appeals. He did not comment on our view that the court did not purport to "read" the Convention; the judges simply passed on the argument petitioners presented (our brief, pages 13-19).

F. 2d 851, 857 (2d Cir. 1965), *cert. denied*, 382 U. S. 816. The Solicitor General agrees:

> "Petitioners' right to recover damages in an amount unlimited by the Convention depends upon a *factual* showing that Eastern accepted Mr. Berguido as a passenger without giving him a ticket that was adequate under Article 3" (his memorandum, page 10, emphasis his).
>
> * * *
>
> "Consequently, *if a claimant proves* that a carrier has defaulted on its Article 3 obligations, the carrier can be held liable for actual damages . . ." (his memorandum, page 9, emphasis supplied).

The Solicitor General also concludes:

> ". . . the present state of the record provides an insufficient basis for determining whether Eastern failed to deliver an adequate ticket . . ." (his memorandum, page 11).

That is another way of saying that "the claimants" did *not* prove the *facts* necessary to present the legal question they want this court to decide. So what possible justification is there for this court's doing anything with the case other than denying the petition for review?

Petitioners understand the dilemma the record creates for them, and in their recent memorandum they try to improve on it. They tell this court, contrary to what the Court of Appeals said and contrary to what the Solicitor General said (his memorandum, page 11), that the Berguido ticket *was* in evidence. They are mis-stating the record. *Copies* of the flight coupons were in evidence. Copies do not recreate size, readability, contrasting color, etc. (and that is what *Lisi* and the Solicitor General are talking about

when they use the phrase an "adequate ticket"). *A factual* decision on those matters was *not* made below and *could not* have been made. The issues framed at pre-trial excluded *those* fact issues, and at trial there was no evidence specifically directed to them. Neither the original ticket nor evidence describing it was introduced. Furthermore, the copies of the coupons which are in the record (4b-8b) show on their face (upper left-hand corner) that they are but part of a whole. Each of the coupons states that it is issued "subject to the conditions of contract on page 2." Plaintiffs did not introduce page 2, and it is not in this record. So the Solicitor General is quite right when he says that the adequacy of the ticket cannot be determined on the trial record.[3]

Petitioners themselves admit that they never raised this "ticket issue" until the case was on appeal (their recent memorandum, page 4). Their candor is admirable. Of course, they were not so candid with the Court of Appeals or that court would have had no reason even to mention Article 3 of the Warsaw Convention (see respondent's brief, pages 13-19). It simply would have affirmed the trial judge's findings as it did. The Solicitor General does not think that that aspect of the case warrants review by this court (his memorandum, page 13, footnote 14).

With Respect to Carlos Berguido's Experience as an International Lawyer the Solictor General Was Misled by Petitioner's Failure to File the Record Required by This Court's Rules.

Under the rules which were applicable when the Petition for Certiorari was filed, petitioners were required to file the record with this court and notify respondent of the

3. On the whole record the ticket was adequate. The parties agreed to that (our brief, page 9).

contents [Rule 21(2)]. Petitioners' notification is appended to this memorandum. We were told that the "Court Proceedings" and one copy of "the record" were filed. Apparently petitioners did not file the proceedings but filed only the portion that suited them. We say that because of the Solicitor General's comment that the facts stated in footnote 9, pages 12-13 of Respondent's Brief in Opposition, are "not a matter of record" (his memorandum, page 11). Footnote 9 is fully documented. Every item but one is taken from the testimony of Frank Truscott, Esquire, at the 1964 trial before Chief Judge Clary. As part of the evidence in the current trial, instead of recalling Mr. Truscott as a witness, it was agreed that Judge Boldt should consider the testimony given in the earlier trial. He did just that (1087a):

> "The Court: Let the record show that in the weekend interval the Court has read in chambers carefully, in detail and totally, the following: . . . Mr. Truscott's testimony in total as recorded in the transcript of the last trial."

One item mentioned in the footnote, that Mr. Berguido purchased flight insurance at the airport, was not in Mr. Truscott's testimony but was made, also by Mr. Truscott, at a pre-trial hearing. That too is in "the record".

If the Solicitor General did not have these matters to review, it must have been solely because these "court proceedings" were not filed with this court. It is not right for petitioners to notify respondent that the "Court Proceedings" were filed when only part of them were. It is not right for petitioners to tell this court that matter they failed to file is "admittedly not of record" (petitioners' recent memorandum, page 5). It most certainly is of record. If it is not with this court, it is solely because petitioners did not file it as they notified respondent they did.

With Respect to "Waiver" the Solicitor General Has Not Examined the Record Carefully.

The Solicitor General says that he could not resolve on the basis of the papers made available to him whether plaintiffs "waived" the "ticket issue" in the District Court (his memorandum, pages 10-11). We presume that the Solicitor General at least had the printed appendices in the most recent appeal in the Court of Appeals. In the pre-trial proceedings (Volume 1 of appellant's appendix) plaintiffs were given the opportunity to raise this issue but did not do so. Hence neither affirmative evidence on their part to show inadequacy of the ticket nor evidence by defendant to demonstrate that Berguido in fact took protective measures was introduced. Here is what the record shows:

At a pre-trial conference Judge Boldt, with the agreement of counsel (57a), narrowed the issues to those presented by Chief Judge Clary to the jury in the 1961 trial (see Fed. Rules Civ. Proc. #16, ". . . such order . . . controls the subsequent course of the action . . .").

> ". . . the charge in the first trial . . . should be a starting point . . . If either of you desire anything other than as in the first charge *or in addition to the first charge* or whatever, please make your requests. You will not have to request anything that is in the first charge, so that it will narrow down what you have to request" (56a, emphasis supplied).
>
> • • •
>
> "As far as I am concerned, I am starting with the first trial charge, and then if either of you wish to request something different, request it, and I will consider it (56a).
>
> • • •

"I am cautioning all of you . . . I am starting with the first charge, but I will consider any requests to modify, deviate, add or anything like that" (57a).

* * *

". . . absent a request for a charge or anything like that, everything in the first charge, including wilful misconduct, will be deemed to be agreed to. Is that clear?

Mr. Richter: Yes, sir." (57a)

* * *

"You have got to call the judge's attention to a point if you expect him to make a ruling" (68a).

In 1961 Chief Judge Clary charged the jury that the Warsaw Convention governed and that the liability limitation of $8,300 was applicable unless plaintiff proved wilful misconduct (13b-15b). The "ticket issue" was not part of the charge.[4] Plaintiff's counsel did raise one new issue about the applicability of the Convention itself, and defendant called for an offer of proof (70a-71a). Plaintiff offered to prove that because a domestic and not an international tax was charged on the Berguido tickets (76a), Warsaw was inapplicable, under a 1964 New York Supreme Court decision, *Hanover Trust v. American Airlines*, 43 Misc. 2d 856, 251 N. Y. S. 2d 517 (1964) (74a). The offer was made in furtherance of Judge Boldt's view (81a):

"The Federal Rules of Civil Procedure contemplate the fullest disclosure to avoid surprise or entrapment. They devolve the broadest powers and discretion in the trial judge to see to it that the proceedings are run according to what he deems necessary for a fair trial."

4. This was also true of the 1964 charge to the jury, and plaintiffs took no exception to the charge in that respect (Record Document #190).

That is the established law:

> "It has long been the law that attorneys at the pretrial stage 'owe a duty to the court and opposing counsel to make a full and fair disclosure of their views as to what the real issues at the trial will be.'. . . It is through such disclosure at pretrial that trial prejudice can be avoided." *Payne v. S. S. Nabob, et al.*, 302 F. 2d 803, 807 (3rd Cir. 1962), *cert. denied*, 371 U. S. 870.

Over the weekend the parties had a chance to check the law and the facts on plaintiff's new theory. Plaintiff's counsel withdrew it (117a):

> "We are candid to admit that the theory that we proposed with respect to the Warsaw Convention when we met with Your Honor is not a valid theory because of the tax laws, and we withdraw that theory."

They then said they wanted "to preserve our position with respect to the Warsaw Convention in that we do not agree that this case is governed by the Warsaw Convention . . ." Judge Boldt asked specifically whether their contentions in that respect "are substantially as stated" in their memorandum of May 22, 1961 (117a).

> "Mr. Lord: That is correct, Your Honor."

The memorandum referred to raises only the question whether Mr. Berguido's flight was international in character as defined by the Convention (9b-12b). It does not claim that the Convention's liability limitations are inapplicable because of delivery of an inadequate ticket.[5]

Judge Boldt asked specifically whether plaintiffs wished to open up any new issue or to present any new proof with

5. When plaintiff's memorandum is read in conjunction with defendant's memorandum of the same date (Record Document 85), there is not only "waiver" but affirmative agreement that the ticket satisfied Article 3 of the Convention (our brief, page 9).

respect to their contentions about the Warsaw Convention and they said they did not (118a).

> "The Court: Yes. You have had a memorandum which you have put in at the beginning of the first trial, as I recall. It is filed here under file date of May 22, 1961, in which you raised an issue as to the applicability of the Warsaw Convention. I would assume that your contentions with respect to it are substantially as stated in that memorandum.
>
> "Mr. Lord: That is correct, Your Honor.
>
> "The Court: All right. But you do not now propose to offer any further proof or ask for a re-opening for that purpose?
>
> "Mr. Lord: That is correct, Your Honor."

The Solicitor General's Recommended Procedure.

1. *The Recommendation Is Contrary to Substantial Justice.*

The Solicitor General's recommendation, that this court duck what issues there are in this case to see if they don't disappear when this court decides *Lisi,* is most unsatisfactory. That is all very well if *Lisi* is reversed. But what if *Lisi* is affirmed? The recommended course, if followed, would lead at the very least to further hearings in the Court of Appeals. And whatever the procedures below, the judgment must stay as it is unless there are new facts found. They could not be found plaintiffs' way unless there were at least a partial new trial. So we see this recommendation as possibly contemplating a sixth trial with entirely new fact issues.[6]

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6. Compare this possibility with the trial judge's view (31a): ". . . this litigation has been very long and protracted. The accident happened in December of 1955, and here we are in September of 1964, and we have a case of this kind. We are now starting the fifth trial, and it just isn't a very happy situa-

The new issues could be: what was the "irregularity", if any, in Carlos Berguido's ticket? Did it mislead him? Did he fail to take protective measures such as purchasing flight insurance, etc.? Who's to decide these matters, judge or jury? Is there to be an entirely new round of interrogatories, depositions and requests for admissions, new pleadings and new motions? Should Pan American, the issuer of the ticket in question, be joined as a third-party defendant for breach of an implied warranty to print understandable tickets or for the failure of their ticket clerk to explain the significance of the Warsaw Convention to a Philadelphia lawyer?

To suggest in this eleven-year-old case that the litigation whirl, finally ended after two full and fair trials, should be set spinning once again because of the sheer accident that some other plaintiffs, who presented a different set of fact issues to a different court, might make out better, is, we submit, basically and fundamentally unjust. Federal procedure is supposed to be "speedy and inexpensive" (Fed. Rules Civ. Proc. #1). "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." (Fed. Rules Civ. Proc #61). That's the theory. The Solicitor General is not applying the theory. On the contrary (perhaps because he was not given the complete record) he is proposing delay and expense. And

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tion. I am not claiming that it is anybody's fault. I merely say that if all litigation in the nation had a history such as this somebody would take the responsibility for the administration of justice out of our hands and put it some place else.

Now, these things do happen. When I was a lawyer I was in cases that had to be tried multiple times. But it is a bad thing, and I want to make every possible effort I can to make this the one final shot and to put it in such a posture that if there is a review on what happens here, wherever it goes from here, they can settle it at some time or other without the necessity at least of another session in a trial court."

all the delay and all the expense will be for nothing unless, after the appellate procedures are finally completed, a new trial is ordered and then at the very least (1) petitioners' counsel are allowed to withdraw their pre-trial agreement that the ticket complied with Article 3, (2) the sworn testimony about Mr. Berguido's experience as an international lawyer is changed, and (3) somehow it is explained to the satisfaction of the fact finder that Mr. Truscott, a counsel of record for petitioners at all trials, was wrong when he told the court and assembled lawyers that Mr. Berguido purchased flight insurance. Does "substantial justice" (Fed. Rules Civ. Proc. #61) permit remand for that?

2. *The Recommendation Requires the Exercise of Jurisdiction Which Does Not Exist.*

There is a serious question whether there is even *jurisdiction* to do what the Solicitor General suggests. No specific reference to this "ticket issue" was made in the motion for new trial (the motion and exceptions incorporated in it are appended). The general "catch-alls" in the motion do not satisfy the requirement that motions "shall state with particularity the grounds therefor" [Fed. Rules Civ. Proc. #7(b)(1)]; 2A MOORE'S FEDERAL PRACTICE, ¶ 7.05, pp. 1542-3 (2d Ed. 1967); *Chicago & Northwestern Ry. Co. v. Britten,* 301 F. 2d 400 (8th Cir. 1962). Under the Federal Rules in existence at the time [the July 1966 amendments provide for a different procedure—Fed. Rules Civ. Proc. #59(d)] according to the "overwhelming weight of authority" a trial court lacked power to grant a new trial on its own initiative more than ten days after judgment. 6A MOORE'S FEDERAL PRACTICE, ¶ 59.11, pp. 3872-73 (2d Ed. 1966). So in this case the power, i.e., the jurisdiction, to alter the judgment on grounds not stated in the motion

for new trial had expired by October 20, 1964 (the judgment was entered October 9). The appeal was not taken until November 10, 1964, and jurisdiction of the Court of Appeals can be no broader than that of the District Court as of the time the appeal was taken.

> "Nothing happened after [October 20th] which could restore or recreate judicial power, with respect to granting a new trial under Rule 59, that had already expired." *Demeretz v. Daniels Motor Freight, Inc.*, 307 F. 2d 469, 473 (3rd Cir. 1962).

The jurisdiction of this court is merely to review decisions legitimately within the scope of the jurisdiction of the Court of Appeals. So where is there any *jurisdiction* to order a new trial on the "ticket issue"? It was not timely raised.

3. *The Recommendation Is Non-Judicial.*

The Solicitor General's recommendation is the antithesis of the judicial process. Cases tried and disposed of are *not* to be reversed on appeal unless there is error. What was the *error* in the proceedings in the trial court? That's the issue. The Solicitor General does not suggest that Judge Boldt committed error. The petitioners do not suggest that Judge Boldt failed to conduct a trial within the framework of his pre-trial order. And the Solicitor General thinks it plain (his memorandum, page 13, footnote 14) that certiorari would not be justified to review the findings that Judge Boldt made.

Justice should be even handed. Excess underwriters in Great Britain (43a) are no less entitled to rely upon the integrity of the American judicial process than is the estate of a Philadelphia lawyer. Through every step of

the litigation process clients evaluate their position and decide how to proceed relying on advice from their counsel. Fair advice is impossible if counsel cannot rely on *the* fundamental fact of litigation life, that the case will be decided on the record. For these purposes the record is not merely the trial record; it necessarily includes pre-trial agreements about underlying facts.

> "An attorney has wide authority in the conduct of litigation. He is chosen to speak for the client in Court. When he speaks in Court, whether it be in a formal trial *or in an informal pre-trial,* he speaks for and as the client. Those statements or agreements which dispense with proof of facts are made with respect to the impending trial and until withdrawn are not merely evidence as in the case of an ordinary admission. *They are absolutely binding.* As long as they stand, they foreclose the matter altogether. See, generally as to admissions by attorneys, *McCormick, Evidence* § 244 at 520 (1954); *Restatement, Agency* §§ 284-291 (1933); *Am. Jur., Attorneys at Law* §§ 67, 68, 85 (1936); *Am. Jur. Evidence* § 592 (1939); 97 A. L. R. 374." *Laird v. Air Carrier Engine Service, Inc.,* 263 F. 2d 948, 953 (5th Cir. 1959). (Emphasis supplied.)

The judicial process which ignores its fundamental tool, the record, is not due process.

As between the Solicitor General's vague recommendation and the prospect of this court's reviewing the entire record below, we would prefer the latter. Then at least we will have the opportunity to demonstrate to this court that there was no error in Judge Boldt's handling of this case and no reason for Chief Judge Clary's arbitrary reversal

of the 1964 jury verdict in Eastern's favor. *On the record* our clients are right and the petitioners are wrong. So our clients would prefer review of *this record* to the possibility—however remote—that they will be subjected to the uncertainties inherent in litigating in 1968 or 1969 issues not heretofore explored concerning 1955 conduct.

We submit, however, that this court has a preliminary question to answer about *the record* petitioners have presented here. Where in the petition for certiorari or in the supporting papers is it demonstrated that at the trial level the petitioners established *the facts* upon which they predicate the legal argument they now advance? The Solicitor General says those facts were not established. No court below said they were. We assure the court that they were not. The petition should be denied.

Suggested Alternative Disposition.

Unfortunately the opinion of the Court of Appeals has created some confusion. The Solicitor General's reading of the opinion demonstrates that. As we understand it no one in this litigation now contends, as petitioners did in the Court of Appeals, that, under the Warsaw Convention, if a plaintiff proves non-delivery of a ticket,[7] he must then prove carrier negligence. If people are going to read the opinion of the Court of Appeals that way, they may be misled. This court, although there is hardly a case or controversy before it, might consider it wise to cure that problem. If the court agrees with the Solicitor General, that review of Judge Boldt's findings as affirmed by the Court of Appeals is unwarranted, then to correct the Court of Appeals' "misreading" of the Convention requires no more than an order along the following lines:

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7. In this case *a* ticket was delivered (see requests for admissions appended to petitioners' most recent memorandum). The "ticket issue" in this case, such as it is, is over "adequacy" not over "delivery."

"Certiorari is granted. The decision of the Court of Appeals is reversed. The judgment is affirmed on the opinion of Judge Boldt."

Respectfully submitted,

OWEN B. RHOADS,
F. HASTINGS GRIFFIN, JR.,
DECHERT, PRICE & RHOADS,
Attorneys for Respondent.

Of Counsel:

DANIEL L. STONEBRIDGE,
JOHN J. MARTIN.

Appendix.

NOTIFICATION OF CONTENTS OF RECORD.

To F. Hastings Griffin, Counsel for Respondent:

YOU ARE HEREBY NOTIFIED that the petition for writ of certiorari in the above-entitled and numbered case was filed in the Supreme Court of the United States on the 22nd day of August, 1967.

The record filed pursuant to the requirement of Rule 21(1) consists of:

Petition for writ of certiorari; Petitioner's Appendix; Opinion and judgment of Court of Appeals for the Third Circuit; Docket entries and Court Proceedings.

(If the record was printed for the use of the court below, state here whether you have or have not filed nine copies as permitted by Rule 21(4).)

One certified copy of the record has been filed with the Supreme Court.

B. NATHANIEL RICHTER,
Counsel for Petitioner.

PLAINTIFFS' MOTION TO SET ASIDE VERDICT.

Plaintiff, Marion J. Berguido, individually, Marion J. Berguido, Robert G. Rowe and Warren H. Woodring, Executors of the Estate of Carlos Berguido, Jr., and June Berguido, Joy Berguido, Jill Berguido and Carlos Berguido, III, by their guardian Marion J. Berguido, moves this Court to set aside the verdict for the plaintiff in the amount of $8300 and the judgment entered thereon, and to enter judgment for the plaintiffs in the amount of $375,000 in accordance with plaintiffs' Motion for Judgment on the whole record and the trial judge's finding of damages sustained by the plaintiff Marion J. Berguido.

In the alternative, plaintiff Marion J. Berguido, individually, Marion J. Berguido, Robert G. Rowe and Warren H. Woodring, Executors of the Estate of Carlos Berguido, Jr., and June Berguido, Joy Berguido, Jill Berguido and Carlos Berguido, III, by their guardian Marion J. Berguido, moves this Court to set aside the verdict for the plaintiff in the amount of $8300 and the judgment entered thereon and to grant a new trial on the grounds stated as follows:

1. The verdict and judgment in the amount of $8300 is against the law.

2. The verdict and judgment in the amount of $8300 is against the evidence.

3. The verdict and judgment in the amount of $8300 is against the weight of the evidence.

4. The verdict and judgment in the amount of $8300 was clearly erroneous.

5. The verdict and judgment in the amount of $8300 was made pursuant to erroneous conclusions and views of the law by the trial judge.

6. The verdict and judgment in the amount of $8300 was made on the basis of insufficient evidence.

7. The verdict and judgment in the amount of $8300 was a result of a mistake made by the trial judge upon reviewing the entire evidence.

8. The verdict and judgment in the amount of $8300 was made upon findings of fact induced by erroneous views and conclusions of law.

9. The verdict and judgment in the amount of $8300 was a miscarriage of justice and a new trial should be granted in furtherance of the interest of justice.

10. The verdict and judgment in the amount of $8300 was clearly erroneous as pointed out in plaintiffs' Exceptions to Findings of Fact.

Respectfully submitted,

RICHTER, LORD, TOLL & CAVANAUGH,

and

F. F. TRUSCOTT,

By ARTHUR G. RAYNES,

Counsel for Plaintiffs.

EXCEPTIONS TO FINDINGS OF FACT.

AND Now, to wit, this day of 1964, plaintiff herewith finds exceptions to each and every finding of fact rendered by the learned trial judge in each and every conclusion of law, under Rule 52(a) as follows:

1. Plaintiff takes exception to the trial judge's finding that ". . . there is not a preponderance of credible evidence that a health condition of either pilot or misrepresentation, if any, relating thereto, constituted willful misconduct causing or contributing to the crash of Flight 642."

2. Plaintiff takes exception to the trial judge's finding that ". . . there is not a preponderance of credible evidence showing a substantial or reasonable probability that the flight 642 crew, or any of them, under other than emergency conditions knowingly and intentionally brought the plane to a position below the minimums prescribed for an ILS approach, or knowingly and intentionally violated any other regulation for or requirement of a proper ILS approach."

3. Plaintiff takes exception to the trial judge's finding that ". . . there is substantial and reasonable probability shown by a preponderance of the evidence that the presence of jet aircraft in or near the ILS glide slope for Runway 5 and in or near the immediate pathway of the landing approach of Flight 642 threatened or interfered with the approach of Flight 642, bringing about emergency conditions and accident resulting in the crash without willful misconduct, negligence or fault on the part of defendant or any member of the crew of Flight 642."

4. Plaintiff takes exception to the trial judge's finding that ". . . the actual cause of the crash of Flight 642

cannot be determined on the record before me and I find willful misconduct as a cause of the accident to be no more than one possibility, among others."

5. Plaintiff takes exception to the trial judge's finding that ". . . willful misconduct, in my judgment, is far less probable as a cause of the crash than the highly probable presence and actions of jet aircraft in or near the ILS approach path of Flight 642."

6. Plaintiff takes exception to the trial judge's finding that ". . . there is substantial probability that one or more jet aircraft were in or near the immediate vicinity of the ILS glide slope leading to Runway 5 during the landing approach of Flight 642 within a very short period of time prior to the plane crash."

7. Plaintiff takes exception to the trial judge's finding that ". . . affirmative testimony as to seeing objects and hearing sounds, when unequivocal, reasonable and ringing true to the trier of fact is far more persuasive and convincing than testimony that said sights or sounds were not seen or heard by other witnesses having opportunity and occasion to see and hear."

8. Plaintiff takes exception to the trial judge's finding that ". . . I do not find as proven by a preponderance of the evidence all of the assumed facts stated in the hypothetical questions put to Kepner, Glickstein and Cann."

9. Plaintiff takes exception to the trial judge's finding that the opinion of Glickstein, Kepner and Cann were incredible and unacceptable in various important and decisive particulars.

10. Plaintiff takes exception to the trial judge's findings as to all other facts contained in his comment on coun-

sel's argument to the Court and the opinion of the Court which show that the findings were clearly erroneous.

11. Plaintiff takes exception to the trial judge's findings of fact which were made pursuant to erroneous conclusions and views of the law.

12. Plaintiff takes exception to the trial judge's findings of fact which were made on the basis of insufficient evidence.

13. Plaintiff takes exception to the trial judge's findings of fact, conclusions of law and verdict because it is clear upon reviewing the entire evidence that a mistake was committed.

14. Plaintiff takes exception to the trial judge's verdict since it was against the clear weight of the evidence.

15. Plaintiff takes exception to the trial judge's verdict because there was no substantial evidence to sustain the verdict as found by the Court.

16. Plaintiff takes exception to the trial judge's verdict because it was induced by an erroneous view of the law.

Respectfully submitted,

RICHTER, LORD, TOLL & CAVANAUGH,

and

F. F. TRUSCOTT,

By ARTHUR G. RAYNES,

Counsel for Plaintiffs.